

STATE OF MICHIGAN  
COURT OF APPEALS

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CATHEY HARP MAYES,

Plaintiff-Appellee,

v

ROY HARP,

Defendant-Appellant.

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UNPUBLISHED

March 16, 2006

No. 265282

Wayne Circuit Court

Family Division

LC No. 92-227678-DM

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying defendant's motion to change custody of his two minor children from plaintiff to defendant. We affirm.

Defendant argues that the trial court clearly erred because it applied a clear and convincing evidence standard, instead of a preponderance of the evidence standard, in determining whether defendant showed proper cause or a change in circumstances to justify an evidentiary hearing on custody. We disagree.

Defendant mischaracterizes the trial court's application of the burden of proof at the August 8, 2005, hearing on defendant's motion for change in custody. A careful review of the transcript reveals that the trial court was not using the clear and convincing evidence standard in its initial determination of whether defendant had shown proper cause or a change in circumstances to warrant a review of the existing custody order. The trial court noted that, if an evidentiary hearing would be held, defendant would be required to show by clear and convincing evidence that a change in custody was warranted. It appears that the trial court made the factual determination that an established custodial environment existed with plaintiff and then noted that defendant would be required to show by clear and convincing evidence that a change in custody was warranted if an evidentiary hearing were held. Furthermore, we note that, although the trial court did not explicitly state that an established custodial environment existed with plaintiff, a review of the lower court record reveals that the minor children have continuously resided with plaintiff since the entry of the divorce on May 5, 1993. "A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

Defendant has failed to show that the trial court required defendant to prove by clear and convincing evidence that proper cause or a change in circumstances existed. Therefore, we conclude that defendant has failed to show that the trial court committed clear legal error. *Id.*

Defendant next argues that the trial judge should be disqualified from hearing any further proceedings in the present matter because the trial judge was biased against defendant. Defendant failed to preserve the issue on appeal by filing a motion in the trial court requesting disqualification of the trial court judge. MCR 2.003(C); *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997). We review an unpreserved issue for plain error affecting defendant's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

"[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge may be disqualified when the judge cannot impartially hear a case, including instances in which the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B)(1); *Cain, supra* at 494. The party moving for disqualification must first show actual bias or prejudice. *Id.* at 495. Further, the party must demonstrate that the judge is personally biased or prejudiced to warrant disqualification. *Id.* The personal bias "must have its origin in events or sources of information gleaned from outside the judicial proceeding." *Id.* at 495-496.

In the present case, defendant bases his claim of bias on several different comments made by the trial court during the August 8, 2005, hearing on defendant's motion for change in custody. First, defendant argues that trial judge was biased based on the trial judge's comments regarding plaintiff's pending contempt proceeding. Defendant contends that plaintiff's pending contempt proceeding was not brought before the trial court and that the trial judge was biased in favor of plaintiff because the trial court noted various instances in which defendant was held in contempt. However, a review of the transcript reveals that defense counsel first informed the trial court of the pending contempt proceedings against plaintiff. "Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester, MI, Lodge No 2225 of Benevolent & Protective Order of Elks of USA*, 228 Mich App 20, 39; 577 NW2d 163 (1998). The trial court's statements were based on facts introduced at the hearing by defendant and on previous proceedings in the matter. Further, the statements do not display a deep-seated favoritism or antagonism on behalf of the trial judge. *Id.* Accordingly, defendant has failed to show actual and personal bias. *Id.* at 40.

Defendant next argues that the trial court improperly referred to plaintiff's response to defendant's motion for change in custody and that this indicates an "ex parte" communication between the trial court and plaintiff. However, a review of the August 8, 2005, transcript of the hearing on defendant's motion reveals that defendant and the trial court were provided a copy of plaintiff's response and that the response was discussed on the record. An ex parte hearing is "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." Black's Law Dictionary (8th ed). Defendant has not offered any evidence of any communications made between plaintiff and the trial court

outside the presence of defendant. Therefore, we conclude that defendant has failed to show that the trial judge had an actual and personal bias against defendant. *Cain, supra* at 495-496.

Finally, defendant argues that the trial court was biased because it noted that defendant had a “credibility problem.” Defendant also contends that trial court held defendant to a higher burden of proof in determining if a review of the custody order was warranted and that this shows that the trial court was biased. It is the trier of fact’s role in a bench trial to determine the credibility of the witnesses. MCR 2.613(C); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Further, “[j]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Cain, supra* at 497 n 30. “Expressions of impatience, dissatisfaction, annoyance, and even anger” do not satisfy a challenge on the basis of bias or partiality. *Id.* Here, the trial judge’s conclusion that defendant was not credible was a proper exercise of the trial judge’s power to determine the credibility of defendant. Furthermore, judicial rulings, even if erroneous, are not grounds for disqualification. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Defendant cannot maintain his claim that the trial judge was biased based on the trial court’s denial of his motion for change in custody. Therefore, we conclude that defendant has failed to offer evidence that the trial judge had actual and personal bias against defendant. The trial judge can properly hear further proceedings in the instant matter.

Affirmed.

/s/ Alton T. Davis  
/s/ Mark J. Cavanagh  
/s/ Michael J. Talbot